

89-1248

Supreme Court, U.S.  
FILED

JAN 30 1990

JOSEPH F. SPANIOL, JR.  
CLERK

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

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JOSEPH M. GALLOWAY,  
JOSEPH M. GALLOWAY, P.C.,  
CLAIR J. GALLOWAY,

Petitioners,

vs.

ALAN ZUCKERT,  
JANICE H. ZUCKERT,

Respondents.

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PETITION FOR A WRIT OF CERTIORARI  
TO THE IOWA COURT OF APPEALS

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QUESTIONS PRESENTED

1. May a State, through its Appellate Courts, do what its Legislature cannot do -- namely, establish standards for libel which violate the Equal Protection Clause of the United States Constitution?

2. To sustain a libel claim, is there a rational basis for requiring a plaintiff in a non-public figure, non-public concern case, to show only negligence on the part of a media defendant, whereas a similarly-situated plaintiff must show actual malice to sustain a libel claim against a non-media defendant?

3. May "actual malice" be shown, not only by an intent to injure through falsehood, but by recklessness in determining the facts?



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PARTIES TO THE PROCEEDING  
AND RULE 28.1 STATEMENT

The caption lists the names of all  
parties to this proceeding.

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PETITION FOR A WRIT OF CERTIORARI  
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COME NOW Plaintiffs and respectfully  
petition for a writ of certiorari to  
review the judgment and opinion of the  
Iowa Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Iowa Court of  
Appeals is unreported and appended as

Appendix A. Said Court's denial of rehearing is unreported and appended as Appendix B. The Iowa Supreme Court's denial of discretionary review is unreported and appended as Appendix C.

#### STATEMENT OF JURISDICTION

The judgment of the Iowa Court of Appeals was entered on August 23, 1989, and a petition for rehearing was denied on September 6, 1989. The order of the Iowa Supreme Court denying discretionary review was entered on November 3, 1989. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

#### CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment provides in pertinent part that:

[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On May 21, 1986, Defendant Alan Zuckert wrote a letter addressed to Plaintiff Joseph M. Galloway, P.C. which had the effect of accusing it and Joseph M. Galloway of breaking their word in a business transaction. Said Defendant sent copies of the letter to the Chairman of the Des Moines Chamber of Commerce, of which Plaintiffs were members, and to a person Plaintiffs did business with.

In pertinent part, the letter stated that:

May I remind you that you and I had a verbal agreement wherein you and your father would continue to lease space at 1535 Linden. We reached that agreement during a telephone discussion around noon on January 29, 1985. Then on February 18, 1985, you did an about-face and advised me you were moving. This took place after verbally agreeing to lease part of the 2nd floor at 1535 Linden. As a result of your abrupt change, I decided I could no longer do business with you on a handshake . . . [emphasis in original]

A libel suit (plus landlord-tenant causes of action not relevant here) was filed by Plaintiffs on June 27, 1986. Defendants answered and filed counter-claims (which are not at issue here). Defendant claimed no qualified privilege for his statements (nor would he have been entitled to any even if claimed).

Ample evidence was introduced at trial to show that Defendant, not Plaintiffs, had gone back on his word with respect to the lease.

The trial court instructed the jury, over objections, that Plaintiffs must show actual malice. The trial court also, over objections, defined actual malice as requiring an intent to injure. The jury verdict and judgment against Plaintiffs were entered on January 19 and 20, 1988, respectively. Plaintiffs made a timely appeal to the Iowa Supreme Court. The Iowa Court of Appeals, as a

subordinate arm of the Iowa Supreme Court, affirmed the trial court. Re-hearing was denied and the Iowa Supreme Court denied discretionary review.

RAISING OF CONSTITUTIONAL ISSUES  
IN COURTS BELOW

There are two Constitutional issues involved here: equal protection, and the definition of actual malice.

The equal protection argument was not raised at the trial court level or in the initial appeal. However, because of a change in court-made "law" since that time (but prior to the ruling on appeal in our case) it was not possible to do so.

What happened is that this case and another case, Jones v. Palmer Communications, Inc., 440 N.W.2d 884, 898 (Iowa 1989) were under appeal to the Iowa Supreme Court at the same time. After

the briefs and arguments in our appeal were made and the case was submitted, the Iowa Supreme Court ruled in the Jones case that when a plaintiff sues the media for libel, in a non-privileged, non-public figure situation, the plaintiff need show only negligence, not actual malice.

Then the subordinate arm of the Iowa Supreme Court -- the Iowa Court of Appeals -- ruled in our case that we must show actual malice in a libel suit against a non-media private party, even though our situation was also non-privileged and did not involve a public figure. No mention of the Jones case was made in the opinion and there was no attempt to show a rational basis for this distinction.

Since Plaintiffs could not have known of the later Jones decision at

trial or when the appeal was submitted, this qualifies as an "extraordinary circumstance" in which the U. S. Supreme Court may consider an issue even though not raised at trial or in the initial appeal. Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 896 n. 7 (1984).

With respect to the definition of actual malice, our objections were timely raised in the trial court (Trial Transcript p. 776) and before the Iowa appellate courts (Plaintiffs' Brief, p. 21).

#### REASONS FOR GRANTING THE WRIT

1. ARE COURTS, AS WELL AS  
THE LEGISLATURE, SUBJECT TO  
THE EQUAL PROTECTION GUARANTEE?

It is undisputed that the Legislature of a State may not violate the Equal Protection clause of the 14th Amendment to the U. S. Constitution.

Likewise, the Courts of a State are similarly subject to the 14th Amendment -- and for purposes of this case, specifically, the Equal Protection clause. Blake v. McClung, 172 U.S. 239, 260 (1898); Ex parte Virginia, 100 U.S. 339, 347 (1879).

This is not some obsolete concept. As Justice Black stated in his dissent in Beck v. Washington, 369 U.S. 541, 568 (1962):

It is a denial of equal protection of the law and a State should no more be allowed to deny a defendant protection of its laws through its judicial branch than through its legislative or executive branch.

Therefore, state courts, as an arm of the state, cannot violate the Equal Protection clause any more than could any other branch of state government. Ex parte Virginia, supra, p. 347.

We submit that this is even more compelling when the courts are acting in

the "quasi-legislative" capacity of promulgating legal standards as opposed to merely applying existing law to a set of facts.

2. WITH RESPECT TO A LIBEL CLAIM,  
IS THERE ANY RATIONAL BASIS FOR  
TREATING PRIVATE DEFENDANTS BETTER  
THAN MEDIA DEFENDANTS?

Under the Equal Protection clause,  
"The State must proceed upon a rational  
basis and may not resort to a classification that is palpably arbitrary".  
Allied Stores of Ohio v. Bowers, 358 U.S.  
522, 527 (1959).

That is to say, mere difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed . . .'

It is idle to elaborate the differences between mutual and stock companies. These are manifest and admitted. But the statutory discrimination has no reasonable relation to these differences . . . The prevailing opinion in that court fails to disclose any good reason for the discrimination.

Hartford Co. v. Harrison, 301 U.S. 459, 462-463 (1937).

There is no rational basis or good reason for treating media defendants worse than private defendants, all other things being equal. On the contrary, because of the First Amendment, media defendants are usually treated better (never worse) than private party defendants in an equivalent situation.

Here, through court-made "law" in the Jones case, the State of Iowa through its Supreme Court has decided that when a plaintiff sues the media (in a non-privileged, non-public figure situation), only negligence need be shown.

But the State of Iowa at the same time has said (through its appellate courts) that a similarly-situated plaintiff must show actual malice if a private party has been sued rather than the media.

We submit that there is no rational basis for this distinction and therefore it violates the Equal Protection clause.

Why are we concerned how defendants are treated by these standards? Because the reverse side of the coin is a direct impact on our libel claim as plaintiffs.

This case is distinguishable from earlier decisions of the U. S. Supreme Court which held that the Equal Protection clause does not guarantee that state courts will not "change their mind" at a later time. Here, both cases were appealed to the same court (Iowa Supreme Court), and were under final submission at the same time (one to the primary court and one delegated to its subordinate arm). The subordinate arm, the Iowa Court of Appeals, has no authority to overrule the higher Iowa Supreme Court. An unconstitutional

discrimination occurred, which by law cannot be considered to be merely a state supreme court's "changing its mind" since the Iowa Court of Appeals cannot overrule the Iowa Supreme Court. It should be noted that there is no automatic appeal of right from the Iowa Court of Appeals to its Supreme Court. Such review is purely discretionary and usually denied.

Never before has this situation occurred -- two cases appealed to the same court and under submission at the same time (although one was transferred to a subordinate arm).

Granting the writ will clarify the extent to which the judicial branch is subject to the equal protection clause -- an issue which has been seldom addressed, especially in recent years. It will not lead to a "parade of horrors", however, because of the unique situation in this case.

3. ACTUAL MALICE MAY BE BASED ON  
RECKLESSNESS WITHOUT AN INTENT TO INJURE

The Iowa Court of Appeals held in this case that actual malice required an intent to injure. This assertion comes from Iowa First Amendment cases repeating what the U. S. Supreme Court has said on this subject.

It is certainly true that the U. S. Supreme Court has stated that a mere intent to injure another is not sufficient -- there must be an intent to injure through falsehood. In other words, the focus is not on the defendant's like or dislike of plaintiff, but on the defendant's state of mind with respect to the truth of the statement (Did he think it was true? Did he think it was false? Was he reckless in not verifying the facts?)

This standard does not require that there always be an intent to injure --

rather it means that an intent to injure by itself is irrelevant. Recklessness in checking the accuracy of the statement, even without an intent to injure, can be sufficient. This is confirmed by Curtis Publishing Co. v. Butts, 388 U.S. 130, 156-57 (1967), especially n. 20. In that case a libel award was affirmed even though there was no serious contention that defendant had any animosity toward plaintiff.

The Iowa appellate courts have therefore misinterpreted the U. S. Supreme Court definition of actual malice.

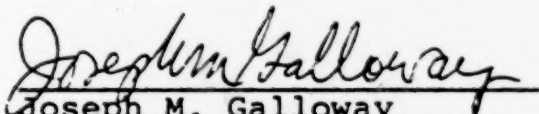
The writ should be granted because (1) The U. S. Supreme Court's statements on this issue, with all due respect, have resulted in confusion. A comprehensive definition of actual malice, incorporating both the oft-quoted "intent to injure through falsehood" aspect, together with the recklessness without

intent to injure aspect of the Curtis case, has never been set forth. (2) This principle has nationwide impact and is not just restricted to Iowa.

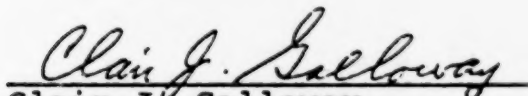
#### CONCLUSION

The petition for a writ of certiorari should be granted, the holding of the Iowa Court of Appeals should be reversed, and this case should be remanded for proceedings consistent with this Court's opinion.

Respectfully submitted,



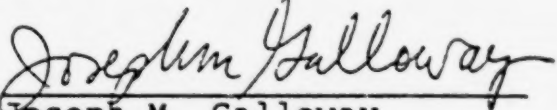
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CERTIFICATE OF SERVICE

I, Joseph M. Galloway, a member of the Bar of this Court, hereby certify that I served three copies of the attached Petition for Writ of Certiorari by first class mail on Jonathan C. Wilson and Diane M. Stahle, attorneys for Defendants, 2300 Financial Center, Des Moines, Iowa, 50309, on this 30~~th~~ day of JAN., 1990.

  
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## IN THE COURT OF APPEALS OF IOWA

JOSEPH M. GALLOWAY, et. al.,                    )  
                    Plaintiffs-Appellants,                    )  
                    vs.    )  
ALAN ZUCKERT, et. al.,                                )  
                    Defendants-Appellees.                        )

9-59  
88-267

[Filed August  
23, 1989]

Appeal from the Iowa District Court for Polk County (66-39057), Glenn E. Pille, Judge.

Tenants appeal and owners cross-appeal a jury verdict in this landlord-tenant dispute. AFFIRMED.

Joseph M. Galloway and Clair J. Galloway, Des Moines, pro se.

Jonathan C. Wilson and Diane M. Stahle of Davis, Hockenberg, Wine, Brown, Koehn & Shors, Des Moines, for defendants-appellees/cross-appellants.

Heard by Oxberger, C.J., and Schlegel and Sackett, JJ.

SCHLEGEL, J.

This appeal arises from a landlord tenant dispute. A jury rejected both the

tenants' claims and the owners' counter-claim. The tenants have appealed and the owners have cross-appealed.

The appellants challenge several instructions and evidentiary rulings, as well as the denial of a judgment n.o.v. on one of their claims. The appellees contend there was no evidence to support that part of the verdict rejecting their counterclaim for unpaid rent.

The plaintiffs, Joseph and Clair Galloway, leased office space in a commercial office building in Des Moines. In 1984 the office building was purchased by the defendants, Alan and Janice Zuckert. Various disputes soon arose between the Galloways and Alan Zuckert concerning terms of the lease, renewal of the lease, and conditions of the building. The Galloways also alleged that Alan Zuckert interfered with their business relationship with a fellow

tenant, a professional secretary service which the Galloways employed.

While the parties were in contention, Alan Zuckert sent a letter to Joseph Galloway and also sent copies of the letter to two other persons, one of whom did business with the Galloways. Joseph Galloway contends this letter falsely accused him of breaking his word.

The Galloways later filed the present suit, alleging breach of lease, interference with a contractual relationship, and libel. The Zuckerts counter-claimed for unpaid rent.

Our scope of review in this matter is for the correction of errors at law. Iowa R. App. P. 4.

I. The Galloways claim that the district court erred by not instructing the jury that the statements in the letter written by Alan Zuckert constituted libel per se. In Vojak v.

Jensen, 161 N.W.2d 100, 104 (Iowa 1968),  
the supreme court defined libel and libel  
per se.

Libel is defined as a malicious publication, expressed either in printing or writing, or by signs and pictures, tending to injure the reputation of another or to expose him to public hatred, contempt, or ridicule or to injure him in the maintenance of his business.

Among statements which are libelous per se are those which charge business incompetence or lack of skill in the trade, occupation, profession or office by which one earns his living.

Id.

These two definitions show that the statements in the letter fall within the definition of libel and not libel per se. The statements in question, such as Zuckert was unable to do business with Galloway "on a handshake," may tend to injure the plaintiff in the maintenance of his business, but they do not specifically charge him with incompetence or

lack of skill. However, the court explained the Vojak holding in Kelly v. Iowa State Education Association, 372 N.W.2d 288, 295 (Iowa 1985). The court held that, "libel per se is not limited to certain charges. The passage in Vojak . . . clearly states that the charges listed are 'among' statements that are libelous per se." "Statements of any nature can be libelous per se. All that must be determined is that the court can presume as a matter of law that publication will have a libelous effect." Id.

The statements in question still cannot be said to be libelous as a matter of law. In addition to the definition set out in Vojak, the court in Kelly would also include statements that impute dishonesty as being libel per se. The statements by Zuckert, that he was not able to do business with Galloway "on a handshake" or that he did "an about-

face," are not synonymous with calling the appellant a liar nor do they impute dishonesty to any great degree. The court in Kelly recognized that when a publication is ambiguous, it is for the jury to decide whether a defamatory meaning was conveyed. Kelly, 372 N.W.2d at 296. The statements in question were sufficiently ambiguous to allow their submission to the jury, and it was not error to instruct the jury that the statements in the letter constituted mere libel.

The Galloways next contend it was error to include actual malice as an element of proof in the jury instructions. The term actual malice, as opposed to legal malice, merely means a plaintiff must prove the existence of malice while under legal malice the law presumes that it exists. The court in Vojak set out the elements of libel and

libel per se. "Certain statements are held to be libel per se, which means that they are actionable in and of themselves without proof of malice, falsity or damage. In actions based on language not libelous per se, all of these elements must be proved by plaintiff before recovery can be had, but when a statement is libelous per se they are presumed from the nature of the language used." Vojak, 161 N.W.2d at 104. The court includes malice as an element in both libel and libel per se. Appellant argues that including the element of actual malice in a claim for mere libel is illogical because it negates the "benefit" of possessing a qualified privilege. In order to overcome a claim of qualified privilege actual malice must be proven. Id at 105. The appellants suggest that if actual malice must be shown in an ordinary libel action the "benefit" of possessing a

qualified privilege is a false one. This is not entirely true. The "benefit" exists because actual malice must always be proven to negate a qualified privilege, even when statements would ordinarily constitute libel per se. Id. The district court did not err in including actual malice as an element of ordinary libel.

The appellants next challenge the definition of malice given to the jury. The district court defined actual malice as a statement made concerning another because of ill-will or hatred, or made recklessly with an intent to injure. In Kelly, the court followed the rule set out in McCarney v. Des Moines Register and Tribune Co., 239 N.W.2d 152 (Iowa 1976), regarding what must be shown in order to prove the element of actual malice. "Actual antagonism or contempt has been held insufficient to show

malice. So has intent to inflict harm. There must be an intent to inflict harm through falsehood." Kelly, 372 N.W.2d at 296. The McCarney case involved a public figure, but the definition of malice as an element of libel does not change depending on who is claiming it. The only thing that changes is whether it must be proven or whether the law will presume its existence.

The Galloways next challenge the testimony given by the defendant telling why the construction was being done on the leased property, and the testimony by defense witnesses as to the reputation of Alan Zuckert as a landlord.

The standard for the review of evidence matters is "clearly unreasonable." "We will not find an abuse of discretion in the trial court's admission or exclusion of evidence unless its action is clearly unreasonable." Blakely

v. Bates, 394 N.W.2d 320, 322 (Iowa 1986).

Iowa Rule of Evidence 701 allows a lay witness to testify in the form of an opinion if such testimony is helpful to a clear understanding of his testimony or the determination of a fact in issue. The question as to whether the construction was legitimate or not was in issue and allowing testimony by Zuckert as to why the construction was going on was certainly helpful and within the discretion of the trial judge.

The admission of the reputation testimony was not prejudicial to the plaintiff. It was the plaintiff who brought Zuckert's reputation as landlord into contention. It was not clearly unreasonable for the trial judge to view the defendant's character as being in issue and not error to allow the testimony.

Finally, appellant contends that the

district court should have granted Clair Galloway's motion for a judgment n.o.v.. Assuming that a proper motion for a directed verdict was made at the close of all the evidence, of which there is serious doubt and which is required by Iowa Rule of Civil Procedure 243(b), appellant was not entitled to a judgment n.o.v.. In reviewing a motion for a directed verdict, the appellate court must consider the evidence in a light most favorable to the non-moving party. Iowa R. App. P. 14(f)(2). Examining the evidence in that light shows the evidence was sufficient to support the jury's verdict.

II. Defendant's Counterclaim. The jury's findings of fact, that no rent was owed, are supported by substantial evidence. Appellee's request for attorney fees on this issue is denied.

AFFIRMED.

APPENDIX B

- 12a -

IN THE COURT OF APPEALS OF IOWA

No. 9-59 / 88-267

Polk County Law No. 66-39057

ORDER

[Filed September 6, 1989]

JOSEPH M. GALLOWAY, et. al.,

Appellants,

vs.

ALAN ZUCKERT, et. al.,

Appellees.

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Appellants' Petition for Rehearing  
is hereby denied.

Done this 6th day of September, 1989.

/s/ Leo Oxberger  
Chief Judge

APPENDIX C  
- 13a -

IN THE SUPREME COURT OF IOWA

No. 88-267

[Filed November 3, 1989]

JOSEPH M. GALLOWAY,  
JOSEPH M. GALLOWAY, P.C., and  
CLAIR J. GALLOWAY,  
Plaintiffs-Appellants/  
Cross-Appellees,

vs.

ALAN ZUCKERT and  
JANICE H. ZUCKERT,  
Defendants-Appellees/  
Cross-Appellants.

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After consideration by this court en banc, further review of the above-captioned case is hereby denied.

Dated this 3rd day of November, 1989.

THE SUPREME COURT OF IOWA

/s/ Arthur A. McGiverin,  
Chief Justice